Electronically Filed
Docket: 2012-6 CRB CD 2004-2009
Filing Date: 04/05/2018 12:42:49 PM EDT

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	)	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
	)	
In the Matter of	)	
	)	
Distribution of 1999-2009 Satellite Royalty Funds	)	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)
	)	

INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO JOINT MOTION IN LIMINE AND MOTION FOR SUMMARY DISPOSITION AS A PAPER PROCEEDING

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its *Opposition to Joint Motion In Limine and Motion for Summary Disposition as a Paper Proceeding*.

On the eve of trial, the MPAA and SDC once again work in unison seeking to squelch any opportunity for IPG, or the Judges, to scrutinize the methodologies submitted by either the MPAA or SDC. The moving parties seek the proverbial "eating their cake and wanting it too", i.e., converting this matter to a "paper

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proceeding", but *only* after considering their challenges to IPG's evidence and *only* after affirmatively excluding that evidence, without presenting IPG any opportunity thereafter to cross-examine MPAA/SDC witnesses.

A. IPG previously consented to this being a "paper proceeding" and *still* agrees that this should be a "paper proceeding".

Although the moving parties now request that this be deemed a "paper proceeding", such was not their position *a few short days ago*. Moreover, the moving parties' desire that this be converted to a paper proceeding is inequitably premised *only* on if the Judges first consider their motion in limine to exclude all direct testimony presented by IPG, *only* if the Judges grant such motion, and *only* if IPG is thereafter foreclosed from cross-examining the moving parties' witnesses. Obviously, *any* party would desire to have their adversary's evidence excluded, and then submit their case "on the papers". Such a scenario precludes any cross-examination of the moving party's witnesses, and creates a situation that prohibits any development of a record that could challenge the moving party's representations – no matter how flawed, biased, or incorrect those representations may be.

What is remarkable are the evidently relevant facts that the moving parties omit from their brief. Specifically, by email of January 19, 2018, the MPAA

requested that the parties consent to make this a paper proceeding, and on January 20, 2018, the SDC agreed thereto. See the Declaration of Brian D. Boydston ("Decl. of Boydston"), **Exhibit A**. Initially, IPG did not agree. However, on March 21, 2018, i.e., two weeks ago, IPG *agreed* to submission as a paper proceeding. Nonetheless, the moving parties then declined. See Decl. of Boydston, **Exhibit B**.

IPG *still* maintains that this can be submitted as a "paper proceeding", but only if the parties' papers and exhibits may be equally considered – not after *only* the evidentiary challenges to IPG's papers are considered *and* granted. As should be evident, if this matter were submitted as a paper proceeding, no basis would exist to make an evidentiary challenge to Dr. Cowan's report, and no basis would exist to exclude its admission. As such, the distortion of process advocated by the moving parties' would be so evidently warped and inequitable that it would be *per se* arbitrary and capricious. *That* is what the moving parties seek.

B. Even if this matter is not converted to a "paper proceeding", Dr. Cowan's Report remains Admissible.

IPG regards it as unfortunate that Dr. Cowan will not be able to attend the hearings, and desired the opportunity for him to elucidate on his methodology, and address criticisms that have been asserted in rebuttal statements. Notwithstanding,

it is a matter beyond IPG's control. Nonetheless, if this matter were converted to a "paper proceeding", no basis would exist to exclude Dr. Cowan's report in IPG's written direct statement. Moreover, and what may be realized from the facts set forth above is that, as of January 20, 2018, both the MPAA and the SDC believed that their rebuttal statements sufficiently addressed whatever issues they desired to raise in connection with Dr. Cowan's report. It was for that reason, both parties requested on January 20,2018 that this matter be submitted as a "paper proceeding".

As set forth in the motion:

> "In an exchange of emails on March 30, 2018, counsel for IPG requested consent to submit the testimony of its sole witness, Dr. Cowan, on the papers without cross-examination. Counsel for MPAA and the SDC refused consent and demanded the opportunity to cross-examine Dr. Cowan."

Motion at 2.

Since January 20, 2018, literally nothing has changed, bar the moving parties' knowledge that Dr. Cowan will not appear. There have been no additional submissions of evidence, no pleadings, or anything else of substance filed that affect what is currently before the Judges. Yet the moving parties *now* suggest that they will be prejudiced by Dr. Cowan's nonappearance. In fact, conspicuously omitted from the motion is *any* assertion that the moving parties will *actually* be

prejudiced. Rather, the moving parties simply assert that as a matter of right they are entitled to have Dr. Cowan's testimony excluded if he does not appear for cross-examination. But again, this ignores that if this were a "paper proceeding", the moving parties' evidentiary challenge to Dr. Cowan's report would be nullified.

As is readily apparent, the moving parties do not seek to have Dr. Cowan appear to actually address any matter that they believe is *necessary* to challenge his testimony. They already conveyed their belief that their rebuttal statements would suffice. Rather, they demand it simply because IPG cannot now compel Dr. Cowan to attend. As such, whereas it may be questionable whether IPG can establish that there is "good cause" for Dr. Cowan not to attend, the moving parties clearly cannot assert *any* cause why Dr. Cowan should be compelled to attend or face exclusion of his direct testimony report.[1]

[1] The moving parties incorrectly argue that the regulations preclude introduction of Dr. Cowan's report if he does not appear, unless "good cause" is established. Specifically, they rely on Section 351.10(a) of the regulations: "No evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown." 17 C.F.R. § 351.10(a). However, Dr. Cowan remains the "sponsoring witness" of his report regardless of whether he appears for oral testimony, no different than when testimonial reports are considered by the Judges in a "paper proceeding", where no witness appears and provides oral testimony.

C. IPG's Designated Testimony remains Admissible, whether a part of IPG's direct case or on cross-examination of MPAA/SDC witnesses.

1. The Designated Testimony was more than 4,638 pages in length.

In its written direct statement, IPG designated the testimony of several witnesses from prior proceedings. According to 37 C.F.R. § 351.4(b)(2), a party may designate testimony from prior proceedings for purposes of its direct statement. However:

> "If a party intends to rely on any part of the testimony of a witness in a prior proceeding, the *complete testimony of that witness (i.e., direct, cross and redirect examination)* must be designated. The party submitting such past records and/or testimony shall include a copy with the written direct statement."

37 C.F.R. § 351.4(b)(2) (emphasis added).

Of the testimony that WSG primarily intends to rely in the hearing scheduled for April 9, 2018, the "complete" testimony of such witnesses equals ***4,638 pages***, most of which is largely irrelevant. Decl. of Boydston, at para. 3. According to the moving parties, WSG is foreclosed from introducing any portion

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That is, Dr. Cowan's attestation under penalty of perjury at the end of his written direct statement report makes him a "sponsoring witness", obviating the regulation and the "good cause" requirement for admission of non-sponsored exhibits.

of its designated testimony because it did not attach 4,638 pages of largely irrelevant testimony to its written direct statement.

In fact, in the 2000-2003 cable proceedings (Phase II; initial round), IPG designated prior testimony and included the voluminous records as attachments, and was chastised for doing so. As such, and despite the existence of a regulation that clearly did not contemplate a party engaging in the task of attaching an unnecessary and cumbersome volume of documentation, IPG elected not to do so.

2. The Designated Testimony was in the possession of the moving parties, obtained in discovery, and capable of being obtained in discovery.

Nonetheless, IPG remained ready, willing, and able to produce the designated testimony as part of the discovery process. In fact, in the 2000-2003 cable proceedings (Phase II; Remand), the SDC *actually* did request and receive the *identical* 4,638 pages of testimony designated in this proceeding. In the immediate proceeding, neither the MPAA or SDC even requested such documents, either specifically or generally, likely because the testimony was in proceedings in which both those parties participated, and were documents freely in their possession. Decl. of Boydston, at para. 3.

In truth, the moving parties seek to exclude the designated testimony on a slim technicality for an obvious reason – they know what the testimony contains. The moving parties are aware that the designated testimony supports the premise of IPG-presented methodologies (past and present), know that it directly contradicts the moving parties' current methodologies, and at all costs do not want such testimony admitted as part of the record in these proceedings.

3. The moving parties "sandbagged" their challenge to the Designated Testimony until two days prior to the hearing, and is now untimely.

The appropriate means by which the moving parties should have challenged IPG's use of the designated testimony in IPG's direct case was not a motion in limine filed two days before trial is to commence. Rather, it should have been a motion to strike portions of IPG's written direct statement, filed long ago. In fact, both of the moving parties *actually filed* motions to strike IPG's amended written direct statement more than 18 months ago, neither of which make mention of any challenge to IPG's designated testimony.[2] Clearly anticipating that such

[2] See *MPAA Motion to Strike Amended Direct Statement of Independent Producers Group* (Sept. 2, 2016), and SDC *Motion for Entry of Distribution Order and Motion to Strike Amended Direct Statement of Independent Producers Group* (Sept. 2, 2016).

designated testimony would be relied on by IPG as part of its direct case, the moving parties did not seek to obtain the designated testimony (through discovery or otherwise), but engaged in the proverbial "sandbagging" of its argument, waiting until two days prior to the hearing to file their motion in limine.[3]

4. Relevant portions of the Designated Testimony are capable of admission on cross-examination, regardless of whether it is inadmissible as part of IPG's direct case, and regardless of whether previously produced in their "complete" state as designated testimony. The MPAA and SDC conceded such fact within the week prior to filing its motion.

Regardless, as previously mentioned, the designated testimony serves a dual function – it both bolsters the explanation and evidence supporting past and present IPG-presented methodologies, and challenges the premise of any viewership-based methodologies such as have been offered by the MPAA and SDC. As such, even if

[3] This fact is particularly ironic given the moving parties' perpetual allegation that IPG is "sandbagging" this or that, including their most recent allegation in the 2010-2013 cable/satellite proceeding that Multigroup Claimants was "sandbagging" some unarticulated argument(s) that had not even been made. See *Order Denying Joint Motion to Strike Multigroup Claimants' Written Direct Statement and to Dismiss Multigroup Claimants from the Distribution Phase*, at 5 (March 26, 2018) ("Finally, the Judges take note of the moving parties' concerns about being 'sandbagged' by MGC in the rebuttal phase. This concern is premature.").

the Judges were to deem the designated testimony inadmissible based on the technicality on which the moving parties rely, such would not preclude IPG's use of the identical testimony as part of its cross-examination of the MPAA/SDC witnesses sponsoring their proposed methodologies. See discussion, *infra*. For that simple reason, the moving parties' challenge to IPG's designated testimony is "much ado about nothing".

Moreover, the moving parties suggest that because the 4,638 pages of designated testimony was not attached to a rebuttal statement, it could not be raised in cross-examination. However, according to the position taken by the MPAA and SDC *during just this prior week*, IPG had no obligation to even identify its cross-examination exhibits. Specifically, in correspondence dated March 29, 2018, MPAA counsel Lucy Plovnick first stated to IPG counsel:

> "As you know, during the hearing, the parties are allowed to file new cross examination exhibits 24 hours prior to being offered."

See Decl. of Boydston, **Exhibit C**.

IPG's counsel questioned whether this was accurate, and whether it was a correct interpretation of the Judges' March 27, 2018 order, and the MPAA (and SDC) persisted, stating on March 30, 2018:

> "Regarding my statements on cross examination exhibits, I am referring to Section 351.10(g) of the Judges regulations and the sentence at the bottom of the first page of the Judges' March 27 scheduling order, which states that any new proposed exhibits must be filed 24 hours in advance of being offered during the hearing. Taken together, these two provisions require any new exhibits to be used in cross examination to be filed in eCRB and exchanged among the parties 24 hours in advance of being offered into evidence during the hearing. This is also the practice followed by the Judges in the recent Allocation Hearing."

See Decl. of Boydston, **Exhibit D.**

On the same day, Ms. Plovnick provided the MPAA exhibit list, but qualified the following:

> "Please note that this exhibit list does not include potential cross examination exhibits, which the Judges' regulations and the March 27, 2018 order permit the parties to exchange and file in eCRB during the hearing 24 hours in advance of being offered."

See Decl. of Boydston, **Exhibit E.**

Obviously, the moving parties have now failed to appreciate the significance of their prior position, or how it contradicts their current position. What is abundantly clear is that a mere few days ago the moving parties contended that neither they, nor any party, had any obligation to even reveal their cross-examination exhibits until twenty-four hours prior to their introduction into evidence. Consequently, there certainly is no prerequisite that only certain types of

cross-examination exhibits (testimony from prior proceedings) can only be admissible if (i) previously made part of either a direct or rebuttal statement, and (ii) attached thereto in a "complete" state, including vast amounts of irrelevant portions thereof.

In fact, IPG fully intended to broach several subjects with the MPAA and SDC witnesses on cross-examination, and to submit cross-examination exhibits that *do not appear* on IPG's current exhibit list. While the moving parties seek to leave the impression with the Judges that the *only* exhibits IPG intended to submit were (i) Dr. Cowan's report, and (ii) designated testimony, such suggestion is beyond the knowledge of the moving parties, and simply incorrect.[4]

D. Even if all evidence submitted in IPG's "*direct*" case is inadmissible, there remains a "genuine issue of material fact". IPG remains entitled to cross-examine MPAA and SDC witnesses and submit cross-examination exhibits, no different than the SDC was allowed in the 2000-2003 Cable proceeding.

Assuming *arguendo* that the moving parties are correct about the exclusion of Dr. Cowan's report and exclusion of the testimony designated by IPG in its

[4] See Motion at 2: "IPG's counsel also provided an exhibit list in which the only exhibits identified were IPG's Amended Written Direct Statement of October 13, 2016, consisting only of Dr. Cowan's written testimony and a series of purportedly designated testimony. See Exhibit B, IPG's proposed Exhibit List."

written direct statement, the entirety of their argument for summary disposition of the matter as a paper proceeding is that "there is no genuine issue of material fact" and that IPG (and the Judges) are then foreclosed from challenging any aspect of the MPAA and SDC proposed methodologies. This is simply incorrect.

On May 4, 2016, the Judges issued their *Order Reopening Record* in this proceeding. Therein, the Judges levied very specific criticisms against the MPAA and SDC regarding their proposed methodologies. Not only have those parties failed to fully address those issues, they seek to obscure such fact by precluding any cross-examination of their sponsoring witnesses. IPG desires to cross-examine the MPAA/SDC witnesses regarding the matters raised in the Judges' Order Reopening Record, and a wealth of other matters that are not immediately apparent, and will be precluded from doing so if this proceeding is relegated to a paper proceeding.

The moving parties assert that the exclusion of all direct exhibits proffered by IPG, if it were to occur, coupled with IPG's election not to file rebuttal statements in the remand proceeding, is somehow equivalent to there being "no genuine issue of material fact" and that the MPAA/SDC methodologies are "uncontroverted". This is not remotely the case.

First, *nothing* in the regulations requires that the parties file rebuttal statements as a prerequisite for challenging any aspect of an adversary's position. No differently, if a matter of contention were not exposed until a hearing, a party would not be precluded from pursuing that line of contention simply because it was not previously articulated in a rebuttal statement. Nor does the failure to file a rebuttal statement suggest a concession that an adverse party's methodology is not disputed. While a rebuttal statement might provide the submitting party an advantage as to the clarity of its attack on a competing methodology, it is not required.

Second, the contention of the MPAA and SDC taken just a matter of days ago (see supra) confirms *their* prior position that rebuttal and cross-examination exhibits are not synonymous, and that cross-examination exhibits need not even be identified until 24 hours prior to their proposed admission. Such fact corroborates that every cross-examination exhibit need not be identified or part of a party's rebuttal statement, for the obvious reason that they can address entirely different topics. As such, failure to file a rebuttal statement is not the same as acceding to a competing methodology, or result in there being "no genuine issue of material fact". There is simply a logical misstep with such argument.

In fact, the regulations do not even contemplate the filing of rebuttal statements until the conclusion of the hearing of the direct case.[5] Specifically:

> §351.11 Rebuttal proceedings.
>
> Written rebuttal statements shall be filed at a time designated by the Copyright Royalty Judges *upon conclusion of the hearing of the direct case*, in the same form and manner as the written direct statement, except that the claim or the requested rate shall not have to be included if it has not changed from the written direct statement. Further proceedings at the rebuttal stage shall follow the schedule ordered by the Copyright Royalty Judges.

37 C.F.R. §351.11 (emphasis added). Consequently, as originally envisaged a hearing would occur wherein cross-examination would occur along with the submission of cross-examination exhibits, and separately a rebuttal proceeding would occur with the submission of rebuttal exhibits (which, in turn, was also subject to cross-examination and cross-examination exhibits). As such, and again consistent with all other aspects of these proceedings, "rebuttal exhibits" is not synonymous with "cross-examination exhibits".

[5] The initial distribution proceedings with which IPG was involved included the process of filing a direct statement, a hearing thereon, the filing of a rebuttal statement, then a hearing thereon. Recent proceedings have changed this process, which presumably existed as a means of counterbalancing the fewer methods of discovery available to participants.

Finally, and *again* assuming *arguendo* that all of IPG's direct statement evidence were inadmissible, which it is not, the question is raised whether a party's lack of a competing methodology means that they have acceded to the adverse party's methodology and are foreclosed from challenging any aspect of the adverse party's methodology. The obvious example for comparison is the initial round of proceedings in the 2000-2003 cable proceeding (Phase II). Therein, the SDC altogether failed to submit a proposed methodology until, under the guise of it being "rebuttal" testimony, attempted to do so a few weeks prior to the hearing. The Judges properly excluded the SDC's newfound methodology, deeming it "trial by ambush". *However*, the Judges did not stop the devotional programming proceedings dead in their tracks, and deem the SDC to have effectively acceded to IPG's methodology because there was no longer "a genuine issue of material fact", and acceding to IPG's proposed distribution figures. Rather, the Judges allowed the SDC to continue with its challenge to IPG's methodology, engage in cross-examination (and did not have prior cross-examination struck), and engage in post-trial briefing challenging the IPG methodology. No differently, IPG cannot be denied the opportunity to engage in the cross-examination of witnesses as to the plethora of issues that are already raised by their written testimony.

CONCLUSION

IPG agrees that this matter can be submitted as a "paper proceeding", and proposed this to the moving parties two weeks ago. However, if done, all IPG-submitted exhibits must be admitted and considered because, at least regards Dr. Cowan's report, the only basis for exclusion would be his nonappearance at a hearing that is not occurring. If this matter is not disposed of as a "paper proceeding", all of IPG's direct statement exhibits are nonetheless admissible for the reasons set forth above, and IPG will have an opportunity to cross-examine MPAA/SDC witnesses as in any other proceeding, and introduce exhibits as part of such cross-examination.

For the reasons set forth above, the requests set forth in the *Joint Motion in Limine and Motion to Summarily Dispose as Paper Proceeding* must be denied or modified, as appropriate.

DATED: April 5, 2018

____/s/_____

Brian D. Boydston, Esq.
PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers Group

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2018, a copy of the foregoing was sent by electronic mail and next day mail to the parties listed on the attached Service List.

_____/s/_____
Brian D. Boydston

MPAA REPRESENTED PROGRAM SUPPLIERS

Gregory O. Olaniran, Esq.
Lucy Holmes Plovnick Esq.
Mitchell, Silberberg & Knupp LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036

SETTLING DEVOTIONAL CLAIMANTS:

Matthew MacLean
Michael Warley
Jessica Nyman
Pillsbury, Winthrop, et al.
1200 17th Street, NW
Washington, D.C. 20036

Certificate of Service

I hereby certify that on Thursday, April 05, 2018 I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO JOINT MOTION IN LIMINE AND MOTION FOR SUMMARY DISPOSITION AS A PAPER PROCEEDING to the following:

MPAA-Represented Program Suppliers, represented by Alesha M Dominique served via Electronic Service at amd@msk.com

Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Signed: /s/ Brian D Boydston